parents if they were alive. As for medical evidence I have pointed out that though no medical specialist has been called in this case and the court therefore did not have the benefit of any medical evidence for consideration, I agreed with counsel for the applicants that the court should not speculate on this matter. I have also considered and was guided by the above-quoted passage in Lord MacDermott's judgment in the said case of *J* v. *C*[11] and decided, with great respect, that the difficulties of this subject cannot be resolved by any theoretical consideration on my part. If there had been any medical evidence adduced I would have given due weight to the expert opinion of the medical specialist but would, of course, have considered it as only a factor in assisting the court in exercising its discretion in the matter. But as the child's future happiness and sense of security are important factors and as advised by Lord MacDermott in the above-quoted passage of his judgment I gave close and anxious attention to the effects of a change of custody in this case and came to the conclusion, on the balance of probabilities, that although there might be some transient effect of taking the infant away from the respondent, there would be no long-term detriment to his health and welfare in the circumstances of this case. With these factors in mind and after much anxious consideration I have in the end come to the conclusion, though by no very great margin, that it would be for the child's benefit and welfare on the long-term view, that custody, care and control of the infant ought to be awarded to the applicants, his paternal grandparents. Accordingly, I awarded the custody, control and care of the infant to the applicants, subject to liberal access by the respondent and her husband at all reasonable times. I therefore ordered the respondent to forthwith deliver the said Alexander Chuah Li Ming to the applicants. In the circumstances of the case I did not order any costs to be paid by either side.

Order accordingly.

Solicitors: *Jayadeva & Kamal; Chang & Vello.*

PUBLIC PROSECUTOR v. KEDAH & PERLIS FERRY SERVICE SDN. BHD.

[A.Cr.J. (Syed Agil Barakbah J.) April 4 and May 27, 1978]
[Alor Star — Criminal Appeal No. 8 of 1976]

Criminal Law and Procedure — Company charged with knowingly being in possession of uncustomed goods — Ferry boat reconditioned in Singapore — New equipment installed — Duty thereon not paid — Proof of mens rea on part of agents or officers of company — Company acquitted — Ferry boat forfeited — Customs Act, 1967, s. 135(1).

Customs and Excise — Reconditioned ferry-boat — New equipment installed — Company charged with knowingly being in possession of uncustomed good — Customs Act, 1967, s. 135(1).

The respondent company had been acquitted on a charge of being knowingly in possession of uncustomed goods. The company owned a ferry-boat which was sent for reconditioning in Singapore, where new equipment, including engines, were installed. Subsequently the ferry-boat was detained by the customs and the respondent company was charged. The learned President, Sessions Court, although he acquitted the respondent company, ordered the ferry-boat to be forfeited.

The Public Prosecutor appealed against the acquittal and the respondent-company cross-appealed against the forfeiture.

Held: (1) the learned President was correct in acquitting the respondent-company as its officers and agent had no knowledge that the goods were uncustomed;

(2) the items fixed to the boat were nevertheless uncustomed goods and the learned President was right in ordering the forfeiture of the boat.

Cases referred to:-

(1) *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor* [1973] 2 M.L.J. 77.
(2) *Wolfgang Pzetzholdt* v. *Public Prosecutor* [1970] 2 M.L.J. 195, 197.
(3) *Public Prosecutor* v. *Yuvaraj* [1969] 2 M.L.J. 89.
(4) *Public Prosecutor* v. *Tay Yew Lia* [1957] M.L.J. 17.
(5) *Public Prosecutor* v. *Fatimah* [1960] M.L.J. 109.
(6) *Lim Kim Chai* v. *Public Prosecutor* [1963] M.L.J. 26.
(7) *Public Prosecutor* v. *Lee Wye Kheng* [1978] 1 M.L.J. 38.
(8) *Koo Chek Yew & Anor.* v. *Public Prosecutor* [1978] 1 M.L.J. 141, 144.
(9) *Sweet* v. *Parsley* [1969] 2 W.L.R. 470.
(10) *Reg.* v. *Tolson* (1889) 23 Q.B.D. 165, 181.
(11) *Proudman* v. *Dayman* (1941) 67 C.L.R. 536, 540.
(12) *Reg.* v. *Ng Hee Weng & Ors.* [1956] M.L.J. 85.

CRIMINAL APPEAL.

Zulfikli bin Ahmad Makinuddin (Deputy Public Prosecutor) for the Public Prosecutor.

Karpal Singh (*Tan Seng Jin* with him) for the respondents.

Syed Agil Barakbah J.: This is an appeal by the Public Prosecutor against the order of acquittal and discharge of the respondent company, the Kedah & Perlis Ferry Services Sdn. Bhd., made by the President, Sessions Court, Kangar on January 20, 1976. The respondent company was charged for being "knowingly in possession of uncustomed goods . . ." on which Customs duty leviable by law amounting to $31,657.35 has not been paid and thereby committing an offence under section 135(1)(d) and punishable under section 135(1)(i) of the Customs Act No. 62/67.

The respondent cross-appealed against the order of forfeiture of the ferry boat "Pulau Singa" made by the learned President on the same day under section 127(1) of the Customs Act.

There are six grounds of appeal. Deputy Public Prosecutor Zulkifli appeared for the Public Prosecutor and Mr. Karpal Singh and Mr. Tan Seng Jin, for the respondent company.

The undisputed facts of the case were that "Pulau Singa", which belongs to the respondent company, was registered in 1969 with the Registrar of Malaysian Ships and given registered number 324060. The boat plied for hire by carrying passengers to and from Kuala Perlis and Pulau Langkawi. Sometime in September 1972, it underwent reconditioning in Singapore. A certificate for the voyage was issued by the Government Surveyor of Ships (PW1). On September 12, 1972, the boat was sent to Chen Meng Shipyard, Singapore with instructions to change the engines and to repair the roof. Two units of Cummins diesel engine were purchased by the representative of the respondent company from Messrs. Scott & English (S.E.A.)

Sdn. Bhd., Penang at a price of $36,000 each for delivery ex-Singapore. Two rescue boats, each capable of carrying 20 persons, at the price of $3,000 each, and one Sanyo refrigerator were also purchased by the respondent in Singapore and sent to Chen Meng. Thereafter reconditioning and repairs were carried out by Chen Meng Shipyard. Work was completed on November 14, 1972. Subsequently when the boat arrived in Penang, PW1, on being informed, boarded it for survey. The boat was anchored off Glugor area. PW1 discovered many new equipment, including the engines, had been installed. After that the boat was allowed to proceed to Pulau Langkawi with the issue of a Port clearance by the Customs at Butterworth. It arrived in Langkawi on November 17, 1972. Thereafter it plied for hire for about one week when it was detained by the Customs at Kuala Perlis Jetty on November 24, 1972. The boat was examined by Customs officer, Md. Yusof (PW2), who prepared a list of new equipment found in the boat (as specified in the amended charge). The prosecution have proved that the items fixed to the boat are in the possession of the respondent, that they are dutiable and that duties leviable thereon have not been paid.

Now, section 135(1)(d) states: —

"Whoever —

(d) knowingly... is in possession of... any uncustomed or prohibited goods;

shall be guilty of an offence...."

Sub-section (2) states: —

"(2) In any prosecution under this section... any dutiable, uncustomed or prohibited goods shall be deemed to be dutiable, uncustomed or prohibited goods, as the case may be, to the knowledge of the defendant unless the contrary be proved by such defendant."

The word "knowingly" in the sub-section imports *mens rea* for proof of guilt. (*Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor*[1]). Once it is proved that the uncustomed goods were in the possession of the respondent, the presumption under section 135(2) comes into operation. (*Wolfgang Pzetzholdt* v. *Public Prosecutor*[2]). The presumption of *mens rea* or knowledge of the wrongfulness of the act is an essential ingredient of every offence. The presumption in sub-section (2) places such knowledge that the goods were uncustomed goods and requires the respondent to prove to the contrary, i.e. to prove on the balance of probabilities as applied in civil proceedings. (*Public Prosecutor* v. *Yuvaraj*[3]). I accept, with respect, the views of Sharma J. in *Wolfgang's* case that: —

"'Knowledge' is a very strong word. It implies a consciousness of facts. It is a word of greater import than 'having reason to believe' and cannot in the interpretation of statutes, and more particularly statutes which are penal in their consequences, be equated with suspicion or doubt."

The point in issue here is whether under the charge for knowingly being in possession of uncustomed goods, it is open to the respondent to raise as a defence that they did not know at the material time that the goods in question were dutiable under the Customs Act. The question is whether the respondents can avail themselves of such defence. In *Public Prosecutor* v. *Tay Yew Lia*,[4] where the respondent, a shopkeeper in Muar, was charged for knowingly being in possession of playing cards found by the Customs in his shop premises Good J. (as he then was) held the defence which requires the respondent to rebut the presumption is to prove that he does not know the duty on the playing cards has not been paid. (See also *Public Prosecutor* v. *Fatimah*[5]). The learned judge did not agree that the respondent as purchaser must be put into inquiry and prove that he has reason to believe that the duty has been paid on the ground that it was not the intention of the sub-section, for otherwise it would have been worded differently. The second ground is that in accordance with the accepted canon of interpretation, the defence, which operates less stringently against the subject, is to be preferred. Adams J. in *Lim Kim Chai* v. *Public Prosecutor*[6] held the view that the effect of the presumption under section 131(2) was to place on the accused the burden of satisfying the court on the balance of probabilities that he did not know that the goods were uncustomed. That was a case where the appellant was charged for knowingly concerned in conveying uncustomed goods with intent to defraud the Government of duties thereon under section 131(1)(e) of the Customs Ordinance, 1952.

To my knowledge, the authorities available on the defence under consideration relate to possession of prohibited goods. (See *Wolfgang Pzetzholdt* v. *Public Prosecutor, Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor* and *Public Prosecutor* v. *Lee Wye Kheng*[7]). In the last case, the appellant was charged for knowingly being in possession of 92 pieces of foreign gold coins which are prohibited from importation except with an import licence. The facts as a whole show that on the balance of probabilities he had no knowledge that the coins were prohibited goods on the ground that there was partial prohibition under the relevant Customs Order in that *bona fide* travellers are allowed to import reasonable quantities of gold coins as part of their personal baggage and intended for their personal use in West Malaysia and some of the coins found resting places in the appellant's pawnshop.

I hold the view that the defence of rebutting the presumption under section 131(2) is not limited. The respondents may raise a defence which operates less stringently against them, in accordance with the accepted canon of interpretation. A defence of lack of knowledge that is available in relation to prohibited goods should also be available, in regard to uncustomed goods. Since not all goods are prohibited, so also not every goods are dutiable under the Act. The presumption that ignorance of the law is no excuse, does not appear to have any application in cases of this nature and should be contrasted with universally known and notorious crimes such as murder or robbery. It is perfectly obvious therefore that anyone faced with a charge of being knowingly in possession of uncustomed goods cannot set up a defence that he does not know the goods are uncustomed better than by saying he did not know that it was necessary to pay duty in the probable and reasonable circumstances of the case, i.e. he did not know the goods were dutiable.

Although the trial President did not put it clearly, I observe that that was his trend of thought as appearing in his grounds of judgment. I would like to add that

as the onus on the respondent company is to rebut the presumption of knowledge on the balance of probabilities, a bare statement of the innocent mind will not suffice. The trial court will have to consider the facts and surrounding circumstances of the case, particularly the acts and conduct of the officers and/or agents of the respondent company involved in the transaction, in its deliberation to enable the court to conclude whether in the circumstances of the case a prudent man will accept the facts as alleged probably exist or otherwise. That, in my view, will avoid the dangerous effect that will arise from accepting a defence of lack of knowledge of the law by a bare statement to the effect. (*Koo Cheh Yew & Anor.* v. *Public Prosecutor*[8] per Arulanandom J.). I lay emphasis on the acts of the officers and/or agents, because a limited company charged under section 135(1)(d) of the Customs Act for the offence of knowingly being in possession of uncustomed goods, could not be found guilty of the offence without proof of *mens rea* of its agents or officers. The persons whose knowledge would be imputed to the company would be those who were entrusted with the exercise of the powers of the company. That was held by the Federal Court in *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor.*[1] *Mens rea* connotes the guilty mind.

In his grounds of judgment, the trial President applied the principles in that case and also in *Wolfgang's* case when he touched quite in detail the evidence of the Managing Director of the respondent company (DW1) in relation to the sequence of events leading to the repairs and refitting of "Pulau Singa" in Singapore. He concluded that neither DW1 nor the other co-directors were aware that the items purchased in Singapore and fitted to the boat were dutiable. He based his decision on the evidence of the Assistant Manager of Messrs. Scott & English in Penang (PW4) that the subject of Customs duty was never discussed when DW1 placed the order for two new engines for delivery ex-Singapore. Attempts were made to repair and refit the boat at Butterworth and Penang shipyards but for reasons stated, unsuccessful. That, according to the learned President, "gave rise to a doubt in the prosecution case as to the guilt of the defendant company in respect of 'knowledge' ". He further accepted the fact that the items fitted to the boat could be seen at all times and nothing was hidden. Lastly, DW1 co-operated with the Customs by producing all the necessary invoices pertaining to the items purchased, immediately on demand. That, according to the President, "showed or indicated to a certain extent of the lack of knowledge on its part that the items fitted were dutiable".

It was submitted by the learned Deputy Public Prosecutor that the President had failed to consider other vital factors. It was a fact that not only DW1 but the other co-directors DW2 and DW3 knew of the refitting to be done in Singapore as the decision was taken at the meeting of the Board of Directors who agreed to spend about $100,000 for the purpose. Thereafter DW1 went to Singapore many times; sometimes together with DW2 and sometimes separately, in connection with the company's business. DW3 also went to see the boat on its arrival at Penang. Further the items replaced were many. The sum of $100,000 spent in a foreign country for the purchase of the new items and refitting is not small. I agree with respect that the above were not considered by the trial President. It is unfortunate that the learned President has failed to put these into his mind, particularly the provision relating to liability of master and agent under section 140(2) of the Act. That is discussed below. Taking these into consideration with the other relevant facts, there was therefore a failure on the part of DW1 and the other two co-directors to make inquiries as to whether the items fitted to the boat attracted Customs duty. Had they done so they would have surely been advised by the Customs of the dutiable nature of the new items fixed to the boat. In this regard I would like to quote a relevant passage by Lord Reid said in *Sweet* v. *Parsley*[9] which was applied with precision by my brother judge, Arulanandom J. in *Koo Cheh Yew & Anor.* v. *Public Prosecutor, supra.* In suggesting the methods of avoiding difficulties faced by the prosecution the full burden of proving *mens rea*, Parliament has not infrequently transferred the onus to the accused so that once the necessary facts are proved by the prosecution, the accused must convince the court that on the balance of probabilities he is innocent of any criminal intention. The provisions of section 131(2) of the Customs Act now under consideration and to a certain extent section 119 are in point.

In suggesting the second method, Lord Reid said: —

> "... The other method would be in effect to substitute in appropriate classes of cases gross negligence for *mens rea* in the full sense as the mental element necessary to constitute the crime. It would often be much easier to infer that Parliament must have meant that gross negligence should be the necessary mental element than to infer that Parliament intended to create an absolute offence. A variant of this would be to accept the view of Cave J. in *Reg.* v. *Tolson.*[10] This appears to have been done in Australia where authority appears to support what Dixon J. said in *Proudman* v. *Dayman*:[11]
>
> 'As a general rule an honest and reasonable belief in a state of facts which, if they existed, would make the defendant's act innocent affords an excuse for doing what would otherwise be an offence'.
>
> It may be that none of these methods is wholly satisfactory but at least the public scandal of convicting on a serious charge persons who are in no way blameworthy would be avoided."

It may be that the second suggestion would apply to a case of neglect or failure to make a declaration of dutiable goods imported or exported as required under sections 78 and 80 respectively of the Customs Act and made punishable under section 133(1)(e) thereof, if such failure is intended to amount to gross negligence. However, the matter is not in point in the present appeal and the respondents are not charged under that section.

Turning to the point in issue, apart from the conduct of the respondent company's officers, the sequence of events from the time of the arrival of the boat at Penang until its detention by the Customs subsequently at Kuala Perlis, show that everything was done above board and there was no concealment whatever indicative of a guilty mind. The grounds discussed below explain the position more clearly.

Grounds (d) and (f) allege that the learned President erred in fact and law in not considering the provision of section 140 of the Act and the true and legal functions of the Agent (DW4) in relation to the defendant company. The relevant sub-section (2) states: —

"Where any person would be liable under this Act to any punishment, penalty or forfeiture for any act, omission, neglect or default he shall be liable to the same punishment, penalty or forfeiture for every such act, omission, neglect or default of any... agent provided that such act, omission, neglect or default was committed... by such agent when acting on behalf of such person or by the clerk or servant of such agent when acting in the course of his employment in such circumstances that had such act, omission, neglect or default been committed by such agent his principal would have been liable under this section."

It is clear that the principal is vicariously liable for the act, omission or neglect of his agent if such act, omission or neglect was committed by such agent while acting on behalf of the principal. In order that the respondent company could be guilty of the charge, it is essential for the court to determine whether DW4's act or omission was committed with a guilty mind. Since the trial President has not considered this issue in his grounds, I will now deal with the relevant evidence adduced and recorded by him during the trial.

In his evidence, DW4 said he was a shipping agent for the respondent company and also registered with the Customs & Excise as an authorised agent under section 90 of the Act, having furnished security of $2,000. He had his office in Prai. On being informed of the arrival of the boat by the captain he filled up several forms required under the law in relation to the boat except the inward manifest form (Exhibit P10) which he took along while inspecting the boat in order to ensure there were no goods on the boat. He noticed the window panes, seats, refrigerator and the engines were new. But he did not see any cargo. So he completed the inward manifest by writing "KOSONG" (NIL) in the form. Then he handed all the forms at the Penang Port Office. After the officer had handed back the forms to him he went across to Butterworth Customs Department where he handed them to a Customs officer (PW8), who in his testimony confirmed it. PW8 inquired about the boat and he informed him the boat had gone to Singapore for refitting and it was then anchored near the Customs Jetty. PW8 then issued a port clearance (Exhibit P12) to enable the boat to leave for Pulau Langkawi.

DW4's explanation with regard to his normal duties, apart from having to report the boat's arrivals and departures, were to supervise the workmen of the respondent company and also to declare what cargo was carried by the boat. He was not concerned with the fittings in the boat. He heard from DW1 that the boat was refitted in Singapore but was not given any details. He was not very thorough with Customs procedure in that respect.

It is clear that DW4 at the material time was acting on behalf of the respondent company and was responsible to declare any goods, dutiable or otherwise, found in the boat. That would include the new fittings in the boat which were dutiable. In order to do so, he would have to be duly informed either by the captain or DW1 with details of the items to enable him to make the necessary declarations. His evidence of lack of knowledge as regards the items was never challenged by the prosecution in cross-examination. Now, the requirements of section 36 for the issue of a port clearance by the proper officer of the Customs include information as to goods (see Exhibit P11). However, the port clearance (Exhibit P12), apart from the name of the boat, tonnage, captain, crew and passengers, includes "arms". Further the inward manifest form (Exhibit P10) require details which refer also to cargo, viz. quantity of packages, description of goods and weight. According to DW4, that was the first time he dealt with a boat that arrived from Singapore to Penang. He mentioned about the boat being fitted in Singapore when asked by the Customs officer at Prai (PW8), who did not inspect the boat because it was not his duty to do so. Considering the facts and circumstances, DW4 was placed in a similar, if not in a worse, position as DW1 as regards the lack of knowledge, i.e. that it was necessary to declare the fittings to the boat. His omission to do so in the circumstances did not amount to any dishonest or criminal intent as to render him criminally liable. The lack of *mens rea* on his part does not make the principal guilty of the offence charged.

I am satisfied the learned President came to a correct decision when he wrote: —

"I am of the opinion that the defendant company had on a balance of probability discharged the burden of proof placed on it to rebut the prosecution case...."

I have no alternative but to dismiss the appeal and confirm the order of acquittal and discharge of the respondent company.

Next comes the cross-appeal by the respondent company. Dealing with both grounds together, I am in agreement with the learned President that section 127(1) should be read with sections 114 and 126 of the Act and with his view that it makes it mandatory for the court to order forfeiture notwithstanding that there may be no conviction if the following two conditions are satisfied: —

(a) if it is proved that an offence against the Act is committed;

(b) the goods were the subject matter of or were used in the commission of the offence.

The position is well explained by the Court of Appeal in *Reg.* v. *Ng Hee Weng & Ors.*[12] The Court of Appeal dealt with the relevant sections under the Customs Ordinance, 1952 which are *in pari materia* with the sections in the Act stated above. On page 86, Good J. said: —

"Our view of section 123, which deals with forfeiture, is that it neatly reflects the wording of section 110(I), which deals with seizure. Section 110(I) does not, as we read it, draw a distinction between goods on the one hand and receptacles, packages, conveyances, etc. on the other. What it does is to enumerate the things which are liable to seizure, and it does this by setting them out culmulatively in the two categories which we have set out as (a) and (b) above, (i.e. (a) goods which were the subject matter of the offence; and (b) goods which were used in the commission of the offence.) Section 123 then comes into operation. It starts of by prescribing the authority empowered to order the forfeiture or the release, as the circumstances may require having regard to the provisions which follow, of anything the disposal of which is rendered necessary by reason of its having been seized under section 110(I). The section then goes on to provide for the disposal of the two categories of things which

may be seized under section 110(I). For the purpose of disposal these are to be treated alike, that is to say, forfeiture must be ordered if they are proved to the satisfaction of the court to fall into either category. In order to achieve this effect, the draftsman has resorted to using the expression 'goods' in the sense of the original definition in section 2, which is applicable, to, and embraces, both categories of things which may be seized.

We are therefore of the opinion that the learned President has no discretion to order the release of the motor car and that the appeal was properly allowed in accordance with the principle laid down by Wilson J. in *Ng Ham's* case." (The words in brackets are mine).

I also lay emphasis on the wording of section 127(1) at the last clause which states "notwithstanding that no person may have been convicted of such offence".

The respondent company was acquitted and discharged because its officers and agent had no knowledge that the goods were uncustomed. The items are still uncustomed goods and are fixed to the boat. Without the two engines the boat will not move and without the other items especially the seats, the boat will not be able to ply for hire. In fact all the others are essential to the needs of passengers. I hold the view that the boat itself in its entity is the subject matter of the offence and falls under category (a). Alternatively, if I am wrong, it falls under category (b). The learned President is therefore right in holding that he was left with no option but to order the forfeiture of the boat. I do not agree that section 17(a) applies as no duty has been paid or short paid through any inadvertence, error or misconstruction on the part of any Customs officer. The cross-appeal is dismissed.

Order of forfeiture confirmed.

Order accordingly.

Solicitors: *Lim Huck Aik & Co.*

ASTIM PERKHIDMATAN PENGANGKUTAN SDN. BHD. v. UTARAYA TRADING SDN. BHD.

[O.C.J. (Arulanandom J.) May 29, 1978]
[Penang — Civil Suit No. 356 of 1977]

Practice and Procedure — Summary judgment — Admission of part of claim — Judgment by consent for sum admitted and unconditional leave to defend claim for balance — Counterclaim — Injunction restraining defendant from receiving payments — R.S.C., 1957, O. 14, O. 21 r. 15.

The defendants were the main contractors to the Lembaga Padi dan Beras Negara (L.P.N.) for certain works and services to be rendered to the L.P.N. The plaintiffs were subcontractors to the defendants. The plaintiffs claimed $16,655.90 for works and services rendered. The defendants by their defence admitted owing a sum of $12,177.70 to the plaintiffs. They also filed a counterclaim claiming that because the plaintiffs had committed a breach of the subcontract the defendants had suffered loss and damage. Soon after the writ was issued, the plaintiffs obtained an *ex parte* order restraining the defendants from receiving any payments from L.P.N. Subsequently they applied by Summons-in-Chambers for leave to enter final judgment against the defendants. In view of the admission in the defence, the Senior Assistant Registrar entered final judgment by consent for the sum of $12,177.70 and gave unconditional leave to the defendants to defend the claim for the balance. The defendants thereupon prayed for a stay of execution of the final judgment on the grounds that they had a counterclaim against the plaintiffs. The learned Senior Assistant Registrar ordered stay of execution pending the trial. The plaintiffs (a) appealed against the decision of the Senior Assistant Registrar to stay the execution of the final judgment and (b) for an order that the counterclaim be struck out. The defendants applied for the injunction obtained by the plaintiff to be discharged.

Held: (1) in this case as a consent order had been made and in view of the counterclaim the proper order was judgment and a stay pending determination of the counterclaim;

(2) the claim and counterclaim were so closely related that the defendant's claim was rightly brought as a counterclaim;

(3) the defendants had not discharged the onus on them to show that the injunction was wrongly obtained;

(4) on the defendants depositing the amount of the judgment in court and on their giving security to the satisfaction of the Senior Assistant Registrar, the injunction should be dissolved.

Case referred to:-

(1) *Wah Loong (Jelapang) Tin Mine Sdn. Bhd.* v. *Chia Ngen Yiok* [1975] 2 M.L.J. 109, 114.

CIVIL SUIT.

Tan Phock Kin for the plaintiffs.

Balwant Singh for the defendants.

Arulanandom J.: In this matter there were three applications made in chambers but because they were inter-related and would require time for argument, they were all adjourned to open court and heard together.

The brief history of the matter is as follows. The plaintiffs are subcontractors and the defendants main contractors to the Lembaga Padi dan Beras Negara (L.P.N.) for certain works and services to be rendered to the L.P.N. The defendants sub-contracted some of the works to the plaintiffs. As a result of payments not being made to the plaintiffs for works and services rendered, the plaintiffs issued this writ against the defendants. The claim was for the sum of $16,655.90 and interest and costs. The defendants by their defence admitted owing a sum of M$12,177.70 to the plaintiffs and also filed a counterclaim claiming that because the plaintiffs had committed a breach of the sub-contract dated April 30, 1976 by unilaterally terminating it on April 26, 1977 the defendants had suffered loss and damage and thereby the plaintiffs were liable in damages and costs to the defendants.

Soon after the writ was filed the plaintiffs obtained an *ex parte* order restraining the defendants from receiving any payments from the L.P.N. with the usual undertaking as to damages.

The plaintiffs then applied by summons-in-chambers for leave to enter final judgment against the defendants for their claim against them. The application was supported by the affidavit of one Abdul Hady bin Ismail the manager of the plaintiffs affirmed on July 25, 1977, deposing that the defendants had no valid defence to their claim. By a supplemental affidavit affirmed on August 2, 1977, the said deponent filed documents and statements of accounts verifying their claim.

The defendants opposed the application.

The Senior Assistant Registrar who heard the application, in view of the admissions in the defence, entered final judgment by consent in favour of the plaintiffs for the sum of $12,177.70 and gave unconditional leave to the defendants to defend the claim for the balance.